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Gordon B. Baldwin

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CRIMINAL MISAPPROPRIATION IN WISCONSIN—PART I*

By GORDON B. BALDWIN**

More than ten years ago work was commenced under the leadership of the Legislative Council looking toward the creation of a Criminal Code. One of the first topics of the project was the law relating to crimes against property. Crimes involving acts directed against property were divided into three types, crimes involving damage to property, trespass upon property and misappropriation of property. It is the purpose of this monograph to survey in the light of the drafting history the criminal law dealing with misappropriations as it has been established in the Criminal Code.

It would have been very easy for the draftsmen to have simplified the statutory provisions dealing with misappropriation by borrowing a definition from the Roman law, ". . . the fraudulent handling of another man's thing, without his agreement, and with the intention of stealing it. . . ." ¹ For a number of reasons this solution was not adopted. The types of misappropriation that society experiences involve varying degrees of risk to life or property or both and consequently legislators require some variation in the penalty that should be imposed. The discretion exercised by prosecutors and courts is guided by requiring them to act within certain legislatively imposed limits. A broad definition might also run afoul of the so-called void-for-vagueness doctrine. A more potent reason for rejecting any blanket definition, however, is that the common law has supplied useful categories of criminal conduct and statutory reform is easier of accomplishment if these categories are retained.

A. *Theft in General.*

Section 943.20 brings into a single statute the contents of some twenty-three statutes which once plagued the law against misappropriation in Wisconsin. It embodies crimes heretofore known as larceny, larceny by bailee, embezzlement, obtaining property by false pretenses

*This is the first of two parts of this article. The second part will appear in the next issue of the Marquette Law Review.

**Associate Professor and Assistant Dean, University of Wisconsin Law School, A.B. 1950 Haverford College, LL.B. 1953 The Cornell Law School.

¹ Kenny's OUTLINES OF CRIMINAL LAW, 17th ed. by Turner, 238 (1958).

and confidence game and calls them "theft."² Other crimes involving misappropriation are dealt with in succeeding sections of Chapter 943. Pleading "theft" requires merely a charge "... that the defendant did steal the property (describing it) of the owner (naming him) of the value of (stating the value in money). . . ."³ The amalgamation accomplished by Section 943.20 eliminates a problem inherent in the prior law. Prior to the Criminal Code a conviction of larceny would not have been sustained on appeal by showing that there was only evidence upon which the jury could properly have convicted of, for example, false pretenses. Under the Criminal Code the jury can bring in a verdict of "theft" which will be sustained if the requisites of any one of the subsections in 943.20(1) are fulfilled.

Prior law remains pertinent in that the various ways in which theft can be committed as set forth in 943.20(1) correspond generally to the old crimes. The proof offered to convict an accused must conform to one of the four subsections of 943.20(1) and the jury must be instructed pursuant to these subsections. Some insight into the meaning of particular words may be gained from a study of the common law.

B. *Theft at Common Law.*⁴

At common law the crime of larceny required a trespassory taking out of the possession of the owner. In the absence of legislation it was left to the courts to define precisely the scope of the crime. This they did by adjusting the concept of possession. Through judicial construction they achieved desired ends of making the crime broader or less sweeping within the same verbal framework. For example, a servant with physical possession of property was held to have only custody;

² 943.20 covers wholly or partially what was included in the following 1953 statutes:

343.14 Larceny; stealing lead pipe	343.32 Sale of land without title
343.15 Larceny from persons or corpses	343.341 Manufacture and distribution of cheating tokens
343.16 Looting	343.35 False pretense as to heirship
343.17 Larceny; property; values; bailee; gas	343.37 Corporation officers; frauds by
343.172 Larceny of property in nature of realty	343.405 Fraud on life insurance company
343.173 Stealing birds, dogs or beasts	343.41 False statements
343.174 Larceny of domestic animals	343.45 Injury to public property
343.175 Fraudulent use of gas, electricity, water, steam	343.50 Booming or manufacturing marked log
343.20 Embezzlement	343.51 Larceny of logs; evidence; damages; right of search
343.24 False pretenses, personating another	343.571 Warehouse receipts, frauds respecting
343.253 Mendicant imposters	348.402 Confidence games
343.31 Gross fraud	

³ WIS. STAT. §955.31 (1959).

⁴ See Melli and Remington, *Theft—A Comparative Analysis of the Present Law and the Proposed Criminal Code*, 1954 WIS. L. REV. 253, for a valuable study by two of the Criminal Code's draftsmen. The Melli-Remington study supplied the initial impetus for this article which also drew upon the hundreds of memoranda and minutes given only limited circulation. These documents are preserved at the University of Wisconsin Law School.

the courts said that "constructive possession" remained with the master.⁵ The servant who misappropriated the property of his master was therefore guilty of larceny, a capital offense at early common law. Similarly a bailee who violated the terms of the bailment was held to have only custody after the violation, and the subsequent misappropriation resulted in a *taking out of the possession* of the owner. Hence larceny by a bailee was accomplished.⁶ The law of larceny thus brought certain misappropriations by bailees and servants within its purview. Close distinctions between "possession" and "custody" made the criminal law highly technical and difficult to administer.

The definition of larceny was narrowed in other respects by the courts to involve only those situations where there was some violent and unmistakable form of a change of possession, usually in the form of a trespass. Possibly the desire to restrict the scope of offenses requiring the death penalty encouraged less sweeping constructions of the concept of possession, except in the cases of bailees and servants.

Judicial expansion upon the definition of larceny did not fill all the needs presented by newly arising problems and changing attitudes as to what constituted improper behavior with regard to property. Two important areas were left untouched by common law larceny: (1) the appropriation of property by a person (not a servant or bailee) who had lawful *possession* at the time of the appropriation, and (2) the acquisition of property by fraudulent means. The crime of embezzlement was created by legislation to provide for the first situation. The crimes of obtaining by false pretenses and confidence game covered the latter. Although there were difficulties in distinguishing among these, the boundaries between the various forms of theft were at least verbally certain. Larceny was theft by a trespassory taking of property out of the possession of another. Embezzlement was a theft by the appropriation of property lawfully in the possession of certain specified persons at the time of the appropriation. False pretenses was theft by fraudulent inducement of another to part with possession of property. Confidence game, a more recent statutory crime, was designed to fill gaps left by the crime of false pretenses, and in Wisconsin required the use of a visible material, token or symbol.⁷

⁵ *State v. Schingen*, 20 Wis. 79 (1865). If, however, the servant received the property in order to deliver it to the master, the servant was held to have "possession," and his misappropriation did not constitute larceny.

⁶ *Accord*, *State v. Burke*, 189 Wis. 641, 207 N.W. 406 (1926) where the crime of larceny by bailee was committed by an attorney who converted funds to his own use obtained by false representation, inducing his client to furnish money with which to purchase stock for the client. Because the attorney did not acquire legal title, the misappropriation constituted larceny rather than false pretenses.

The doctrine that the bailee who violated the terms of the bailment could be treated as one who committed larceny can be traced to *The Carrier's Case* in 1473, see Hall, *THEFT, LAW AND SOCIETY*, Ch. I (2nd ed. 1952).

⁷ *State ex rel Labuwi v. Hathaway*, 168 Wis. 518, 170 N.W. 654 (1919).

Wisconsin statutes dealing with misappropriation prior to the Criminal Code embodied this common law structure. As new problems arose, piecemeal legislation was passed to meet specified problems. The number of statutes increased to the point that boundaries between the three major forms of theft, once verbally clear, became confused. Construction of the many statutes led to overlaps and inconsistencies making their administration more difficult and the law more uncertain and less predictable. Section 943.20 was designed to remedy the confusion.⁸

C. 943.20(1)a.

1. *Requisite action*

943.20(1) a penalizes as a thief, one who :

Intentionally takes and carries away, uses, transfers, conceals, or retains possession of movable property of another without his consent and with intent to deprive the owner permanently of possession of such property.

In construing 943.20(1)a an unintentional ambiguity on the face of the statute should be resolved to determine specifically what the prosecution must prove. Does the statute require proof that a) the defendant did "take" possession of certain property *AND* b) do something further? Or, need the prosecution merely show that the defendant either "took and carried away," or "used," or "transferred," or "concealed," or "retained possession of," property? This ambiguity was not intended.⁹

⁸ Only Louisiana has combined larceny, embezzlement and obtaining by false pretenses into a single statute redefining unapproved behavior in relation to property. LA. STAT. 14.67 (1950). A number of states have combined the crimes within a single section thus reducing pleading difficulties, see N.Y. PENAL LAW 1290 (1944); see Stumberg, *Criminal Appropriation of Movables—A Need for Reform*, 19 TEX. L. REV. 117, 300 (1941). The Model Penal Code, Tentative Draft #2 contains a valuable analysis of the legislative problems.

The Wisconsin Proposed Code of 1953 suggested a single section defining the crime of "stealing" as follows:

343.20 STEALING. (1) Whoever does any of the following may be penalized as provided in sub. (3):

(a) With intent to appropriate the property to his own use, intentionally takes, uses, transfers, conceals, or retains possession of the property of another without his consent; or

(b) With intent to appropriate the property to his own use, intentionally obtains the property of another by misleading him with a false representation of past or existing fact or with a promise made with an intent not to perform it; or

(c) Having an interest in the property, takes, uses, transfers, conceals, or retains possession of that property with intent to defeat the interest of another therein; or

(d) With intent not to pay for them, obtains the services of a public utility.

⁹ The 1950 recommendation of the Code's draftsmen would have established a single offense of "stealing" by punishing:

[Whomever] "intentionally appropriates the property of another without his consent by means of deceit. . ."

The significant point in this provision is the meaning of the word "appropriates." It was defined as an "exercise of dominion over property in a manner inconsistent with the rights of the owner, either by taking, obtaining, using, transferring, concealing, or retaining possession of his property." This propo-

On the contrary, the draftsmen intended to describe precisely prohibited behavior with respect to property.

The Model Penal Code in its tentative draft dealing with theft takes the position that the behavior sought to be proscribed can best be described as a "... taking or exercise of unauthorized control. . . ." ¹⁰ The kinds of behavior-circumstances enumerated in 943.20(1)a are examples of a taking or assumption of unlawful control, and such legislative history as is available leads to the conclusion that the codification that the Criminal Code accomplished was intended to embody the reformation of the law of larceny to avoid the extreme technicalities of the common law. ¹¹ Consequently it seems sound to conclude that the

sal made no longer determinative the question of who had possession of the property. Under the 1950 recommendation a person lawfully in possession of another's property may intentionally exercise dominion over it in a manner inconsistent with the rights of the owner just as much as one who *takes* the property out of the owner's possession. The "take" notion was not a vital part of the appropriation, but was merely one way of appropriating.

The 1953 Proposed Code punished for the crime of "stealing" persons who committed one of several kinds of misappropriation, including:

"[Whoever] with intent to appropriate the property to his own use, intentionally takes, uses, transfers, conceals, or retains possession of the property of another without his consent. . . ."

The words "appropriate the property to his own use" were defined as an "exercise of dominion over the property in a manner inconsistent with the rights of the owner." To come within the purview of the Proposed Code the defendant must "take, use, transfer, conceal or retain possession" of the property. Under the 1953 Proposed Code as under the 1950 Recommendation it made no difference whether the misappropriated property were in the possession or custody of the actor or in the possession or custody of another. (See Bill No. 100 A p. 112, Vol. 5, 1953 Wisconsin Legislative Council Report). As in the 1950 Recommendation the act essential for the crime could be accomplished in several ways, only one of which required a taking. The 1950 and 1953 proposals thus proscribed certain behavior in terms somewhat different than the common law.

The Criminal Code Advisory Committee revised the 1953 Proposed Code's theft provisions apparently with a view to reviving some of the old common law language such as "takes and carries away." (See minutes of May 7, 1955 p. 12-13).

¹⁰ The Model Penal Code, Tentative Draft #4, Sec. 206.1 states that: "A person commits theft if he takes or exercises unauthorized control over movable property of another. . . ." A comment to this section states:

"This description of the behavior that constitutes theft of the larceny-embezzlement type replaces the common law larceny requirements of 'caption' and 'asportation,' as well as a great variety of current legislative terms such as steal, take, remove, carry away, receive, secrete, conceal, withhold, retain, fail or refuse to pay, appropriate, convert, embezzle, misappropriate, convert embezzle, misapply, sell, convey, transfer, dispose, pledge, use. Most of these are only examples of the exercise of unlawful control." (Comment 3, Tentative Draft #2).

The language adopted in 943.20 is archaic in that the interest in property deemed worthy of contemporary protection is best described in terms of excluding others from exercising certain authority over the property of others. Possession, a troublesome concept in common law larceny, was both narrowly and broadly construed according to the impact that it was desired the law of larceny to have. See Kenny, *OUTLINES OF CRIMINAL LAW*, 17th ed. by Turner 238-239.

¹¹ 1953 Report, Wisconsin Legislative Council, Vol V p. ii; see also Platz, *The Criminal Code*, 1956 Wis. L. Rev. 350, 374. This excellent oft-cited article

statute describes the kind of behavior that might more accurately be described as a "... taking or exercise of unauthorized control. . . ." Hence the latter alternative interpretation of the ambiguity is preferred.

In delineating the behavior made criminal in 943.20(1)a unusual difficulties will be encountered if the words are construed mechanically without regard for the interests protected. An example suggested by the Model Penal Code illustrates this. At what point is a theft committed when a man contemplating the theft of an automobile commences the actions intended to accomplish his purpose? When he opens the unlocked car door? When he sits in the driver's seat? When he either picks the lock or crosses the ignition wires? When he starts the engine? When he shifts into gear? When he puts the car into motion? At the last stage the thief has clearly come within the purview of 943.20(1)a, for he has begun to carry the property away, but critical wrongful acts have already occurred to which the law may wish to attach the consequences of a completed crime. By sitting in the driver's seat the actor may have taken possession or he may be now *using* the car. The comment to the Model Penal Code suggests that:

... the critical psychological 'threshold' for a would-be auto thief is probably the point at which he enters the car and addresses himself to the controls, rather than the moment when he releases the clutch or steps on the gas to put the car in motion. Before he 'takes the wheel' he will be more easily frightened off or he may voluntarily desist. . . .¹²

If the actions detailed in 943.20(1)a are construed to describe behavior resulting in an "unauthorized control" the crime is committed when the actor takes possession and control by "taking the wheel." If it is not theft at this point, then it is conduct which may be deemed attempted theft.¹³

Punishment of the person who misappropriates property lawfully within his possession will be made more difficult unless the behavior-circumstances detailed in 943.20(1)a are considered as alternatives. Other jurisdictions supply illustrations of the difficulties of a different approach. Conforming to the common law requirement that some sort of trespass be disclosed some courts have refused to find criminal an intentional and wrongful misappropriation of property. The Uniform Code of Military Justice punishes any person "who wrongfully takes, obtains, or withholds [property] by any means whatever from the possession of the true owner or of any other person."¹⁴ A court martial found that the accused, in consideration of \$5, pawned a watch for a

by one of the code's draftsmen states with respect to 943.20, "... most of the difficulties which have been encountered in the past are eliminated."

¹² Tentative Draft #2, Sec. 206.1 Comment 3.

¹³ WIS. STAT. §939.32 (1959).

¹⁴ Article 121, Uniform Code of Military Justice, 10 U.S.C. 921.

friend who had stolen it. The conviction was reversed on appeal on the ground that the statute, stating the common law, required that there be a "taking by trespass" from the possession of the owner. The theory of a wrongful withholding of the watch, without presence of an element of *taking by trespass* was held insufficient to sustain a conviction.¹⁵ This result was reached in spite of the assumption that the actor intended to misappropriate and in fact had acted so as to reduce the true owner's chance of regaining the property.

Although courts dealing with theft cases often emphasize the trespass notion, larceny by trick cases reveal that trespass was not an essential element, even under Wisconsin law prior to the Criminal Code *if the actor were a bailee*.¹⁶ In *Vought v. State*¹⁷ the defendants, members of a town board, decided to profit from their position. They went through the procedure of allowing claims and making out orders for the payment of money to fictitious people. Some of these fraudulent claims were presented for payment by the defendants. On appeal from a conviction for larceny one of the town board members claimed he was not guilty of larceny because he had lawful possession of the property misappropriated; if he was guilty of anything, he claimed, it was embezzlement. The conviction for larceny was sustained by the court which said:

... the property of the town was in possession of its officers for lawful, not for unlawful, purposes, and every unlawful diversion of funds of the town by its officers involves the element of non-consent on the part of the town. Nor is it necessary that a trespass in the technical sense be committed in order to constitute larceny, where the property is taken by artifice, fraud or false pretenses.

This interpretation of the larceny by bailee provision in the pre-Criminal Code law blurred the distinction between larceny and embezzlement to an even greater extent. If the interpretation is accepted, the merger of larceny and embezzlement into a single section was accomplished prior to the Criminal Code.

The Code does not offer much assistance in defining the meaning of various words used to describe the requisite behavior for theft. "Transfer" is defined as "... any transaction involving a change in possession of any property, or a change of right, title, or interest to or in any

¹⁵ United States v. Kopp, 15 C.M.R. 815 (1954), *cf.* United States v. Buck, 3 U.S.C.M.A. 341, 12 C.M.R. 97 (1953).

¹⁶ Burns v. State, 145 Wis. 373, 128 N.W. 987 (1911); see also Bergeron v. Peyton, 106 Wis. 377, 380, 82 N.W. 291 (1900).

¹⁷ 135 Wis. 6, 15, 114 N.W. 518 (1908). The distinction between conversion by a bailee of an entire thing (not common law larceny) and the unlawful breaking of bulk with intent to deprive the owner permanently of possession (larceny since *The Carrier's Case*) was abolished by statute in 1887, Laws of 1887 c. 278, which amended WIS. REV. STAT. 4415 (1878); Burns v. State, *supra* note 16.

property.”¹⁸ For the meaning of other terms one must refer to case law and the construction of similar statutory language. In referring to the common law, caution must be exercised because theft is now more leniently treated and common law distinctions and constructions designed to mitigate the hardship of a strict application of concepts may lose their persuasiveness in a modern setting.

The common law constituted the basis of the English Larceny Act of 1916 wherein one commits larceny who “takes and carries away” the property of another, etc.¹⁹ The definition of “takes” includes in this statute obtaining possession:

- (a) by any trick;
- (b) by intimidation;
- (c) under a mistake on the part of the owner with knowledge on the part of the taker that possession has been so obtained;
- (d) by finding, where at the time of the finding the finder believes that the owner can be discovered by taking reasonable steps. . . .

This inclusive definition might properly obtain in Wisconsin. It is compatible with pre-Criminal Code cases in Wisconsin dealing with larceny by trick.²⁰ Larceny by trick grew out of the rule that fraud vitiates consent, and that a person obtaining possession by fraud does not have possession with the consent of the owner. Confusion surrounded the application of this principle because of the overlap between a larceny by a bailee and an embezzlement involving a trick. A distinction was made in the cases between obtaining possession only and obtaining title as well as possession. Illustrative of the latter distinction is *Brockman v. State*,²¹ where a conviction for larceny was reversed. The defendant inserted in a Milwaukee paper an ad stating: “Elderly man or woman may find a good permanent home if desired, with respectable woman and daughter in return for a safe loan on property and interest for \$300. Must have money in a short time.” Relying upon this ad the complainant paid the money but received no lodging in return. The court held that the complainant had not intended to retain any ownership in the money but had given the defendant the money for her own use entirely. Because the defendant had obtained title as well as possession of the money, she could not be guilty of larceny. The question of whether the defendant’s conduct constituted false pretenses was not before the court. The *Brockman* case remains today as an illustration of a situation where proof of theft might be sought under 943.20(1)d but not under

¹⁸ WIS. STAT. §939.22 (40) (1959).

¹⁹ 6 and 7 Geo. 5, c. 50; Halsbury’s Statutes of England 2nd ed., Vol. 5. The purpose of the act was to “consolidate and simplify” the law relating to larceny. It may be taken as embodying the common law definition of larceny. Stephen’s, DIGEST OF THE CRIMINAL LAW, 8th ed. by Sturge (1947) 320.

²⁰ *State v. Burke*, *supra* note 6.

²¹ 192 Wis. 15, 211 N.W. 936 (1927).

943.20(1)a. The import of decision was that there was no taking of possession, nor was there any use, concealment, or retention of the property of another.

In summary, the requisite act which must be proven to sustain a conviction under 943.20(1)a is either a taking and carrying away, a use, a transfer, a concealment, or a retention. If the other requisites are present a theft may be established.

2. *The object of theft under 943.20(1)a.*

The object of the theft specified in 943.20(1)a is "movable property," defined as:

Property whose physical location can be changed, without limitation including electricity and gas, documents which represent or embody tangible rights, and things growing on, affixed to or found in land.²²

In the old statutes numerous sections were enacted to enlarge the subject matter of larceny, because the common law limited it to personalty. Deeds to land, choses in action, things affixed to the land, once outside the scope of common law larceny, were brought within by specific statutes. Because property in the Criminal Code was broadly defined many sections could be eliminated.²³

The mere fact that the object of the theft is a contraband article has no bearing on whether a theft can or cannot be committed, so long as the

²² WIS. STAT. §943.20(2)b (1959) "Property" is in turn defined in 943.20(2)a *infra*. The definitions are similar to those adopted by the Model Penal Code. See 206.64, Tentative Draft #2.

²³ The following sections were repealed:

343.14 Larceny; stealing lead pipe; penalty, specified that lead pipe from a partially constructed building may not be stolen.

343.15 Larceny; from persons or corpses, and 343.16 Looting, were like the section discussed above in that they dealt with larceny in particular circumstances. Because they covered circumstances which made stealing particularly dangerous or undesirable, the penalty in the new section is increased in subsection (3)d under the same circumstances. (943.20(3)d).

343.17 Larceny; property; values; bailee; gas, contained a long list including certain choses in action and gas, water, steam, or electricity.

343.172 Larceny of property in nature of realty, made property in the nature of realty a subject of larceny, thus abrogating the common-law rule in that respect.

343.173 Stealing birds, dogs or beasts, including certain animals not the subject of larceny at common law.

Fraudulent use of gas, electricity, water and steam, was principally a specific attempt section, prohibiting the doing of certain things to gas, water, steam, and electricity meters and equipment with intent to defraud. Gas, water, steam and electricity are all property and anyone obtaining them by hooking up unauthorized pipes or rigging the meter so it does not register is guilty of taking the property of another without his consent. See also §§98.25 (2), 98.26.

343.45 Injury to public property, made it a crime, among other things, to steal timber, minerals, earth and stone from state lands.

343.50 Booming or manufacturing market log, prohibited specific conduct in relation to logs which amounted to stealing them.

343.51 Larceny of logs; evidence; damages; right of search. Subsection (1) covered the larceny of logs. See 30.083 Conversion of logs.

object comes within the broad definition of property in 943.20(2).²⁴ Wisconsin specifically indicates that matter such as electricity and gas may be the subject of theft thus avoiding a gap in the law found by decisions in some other jurisdictions.²⁵ At common law real property was not the subject of larceny nor were the fixtures such as buildings, fences, or machinery attached to the land, unless the real property had acquired the character of personal property through some act of a person other than the thief. Such an artificial distinction is specifically rejected by the definition in 943.20(2)a stating:

. . . all forms of tangible property, whether real or personal, without limitation including electricity and gas and documents which represent or embody a chose in action or other intangible rights.

All tangible things are now subjects of theft including negotiable notes,²⁶ commercial paper, and the like.²⁷

The comprehensive definition of property in the Criminal Code does not, however, reach all persons who intend a misappropriation. It does not reach the deceiver who takes *labor and services* from another without any intention of paying. The doctor, architect, engineer and garagemen may be victimized and deserves protection, but the property definitions are not comprehensive enough to cover these misappropriations of services and time. If criminal sanctions are needed to protect them specific statutes must be enacted.²⁸ A number of statutes outside the criminal code deal with misappropriation of certain kinds of property such as timber theft,²⁹ use of false weights or measures,³⁰ theft of tax moneys,³¹ banking funds,³² theft by contractors,³³ theft from a decedent's estate,³⁴ but the professional man must continue to rely on the inadequate civil remedy for their protection.

²⁴ *State v. Clementi*, 224 Wis. 145, 272 N.W. 29 (1937). See *People ex rel Koons v. Elling*, 190 Misc. 998, 77 N.Y.S. 2d 103 (N.Y. Spec. Term Ontario Co. 1948) where the court rejected the defendant's claim that larceny could not be committed because the money was taken from an unlawful slot machine in which no person could have any title or possessory rights. *cf. People v. Otis*, 235 N.Y. 421, 139 N.E. 562 (1923).

²⁵ See *People v. Ashworth*, 220 App. Div. 498, 222 N.Y. Supp. 24 (4th Dept. N.Y. 1927) but *contra*, *People v. Menagas*, 367 Ill. 330, 11 N.E. 2d 403 (1937).

²⁶ *Farrell v. Phillips*, 140 Wis. 611, 123 N.W. 117 (1909).

²⁷ See *Carver v. Pierce*, Style 66, 82 Eng. Rep. 534 (K.B. 1648) for an extensive discussion of whether dung was a chattel or part of the realty. The law will no longer be enriched with such issues.

²⁸ For example see 943.21 Fraud on hotel or restaurant keeper; 943.22 Use of cheating tokens; see Model Penal Code Tentative Draft #4 Sec. 206.7 and comment in Tentative Draft #2 p. 91. The problem is illustrated by *Chappell v. United States*, 270 F. 2d 274 (9th Cir. 1959) where the court had to dismiss a charge that an Air Force Master Sergeant converted to his own use services and labor of a member of the armed forces.

²⁹ WIS. STAT. §26.05 (1959).

³⁰ WIS. STAT. §98.25 (1959).

³¹ WIS. STAT. §78.15 (1959).

³² WIS. STAT. §221.39 (1959).

³³ WIS. STAT. §§289.536, 289.02(4) (1959).

³⁴ WIS. STAT. §§312.05, 312.06(1) (1959).

3. *Property of Another*

Theft as described in 943.20 is an offense against the property "of another."³⁵ This is defined in 939.22(28) as ". . . property in which a person other than the actor has a legal interest which the actor has no right to defeat and impair, even though the actor may have a legal interest in the property." Consequently when property is abandoned it is no longer the property "of another."³⁶ Whether or not property is abandoned is an involved question of fact.³⁷ "Property of another" is defined in 943.20(2)d as including ". . . property in which the actor is a co-owner and property of a partnership of which the actor is a member, unless the actor and the victim are husband and wife."³⁸ Thus it is not possible for a spouse to be found guilty of the theft of property in which each has an interest and no third person has a share. One spouse may, however, steal the property owned solely by the other.

That the property may have been "lost" does not mean that it can not be misappropriated because the right of the true owner is still deserving of protection. The finder of lost property by his finding commits no crime, but where the finder retains the property from the true owner with the requisite criminal intent, a theft may be present under 943.20(1)a because of the unauthorized retention of control.³⁹ In effect what is punished is a failure to act accompanied by a mental purpose intentionally to retain possession so as to deprive the owner permanently of possession. *A fortiori*, one who negligently fails to restore property is not a thief. To convict for a *retention* it should be shown that (1) the actor knows the identity of the owner, or by reasonable efforts could learn his identity and that (2) the actor purposely omits to take reasonable measures to restore the property to the owner.

At common law whether the actor committed larceny or not respecting lost property depended on the actor's state of mind at the moment of finding.⁴⁰ If he had no criminal intent at the time of finding there could be no conviction for larceny although he subsequently decided to appropriate the property to his own use. The rationale for the distinction was that common law larceny involved an infringement of another's possession, and if there was no trespass there could be no larceny. It is virtually impossible to make a realistic appraisal of the actor's state

³⁵ cf. WIS. STAT. §943.20(1)c (1959) wherein the accused may have a legal interest in the property, but nonetheless commits theft by a taking from a person with a superior right of possession.

³⁶ Clifton v. State, 52 Wis. 533, 9 N.W. 389 (1881). cf. State v. Taylor, 3 Dutcher 117, 27 N.J. 117, 72 Am. Dec. 347 (1858).

³⁷ Pleau v. State, 259 Wis. 105, 47 N.W. 2d 330 (1951).

³⁸ Contra in some jurisdictions where one may steal joint property from ones spouse—see People v. Morton, 308 N.Y. 96, 123 N.E. 2d 790 (1954).

³⁹ See Model Penal Code, Tentative Draft #4, Sec. 206.5; English Larceny Act of 1916, *supra* note 19, finding is a theft if "at the time of the finding the finder believes that the owner can be discovered by taking reasonable steps."

⁴⁰ Model Penal Code, *ibid*, Comment #2; Perkins, CRIMINAL LAW 208-209.

of mind when a piece of property is found and the result in the cases which have considered this problem seems to depend more on matters revealed by the actor's subsequent conduct.⁴¹

The criminal law seeks to protect the owner's interest against an improper retention of control and if the actor after having formed the requisite criminal purpose, "takes" unauthorized control of or retains the property, even though he may have acquired it lawfully, a Wisconsin court could properly sustain a conviction under 943.20(1)a and find support in the old law on the ground that the finder has become a bailee of the property.⁴² A number of cases evaluated the actor's state of mind at the time of the finding by examining whether the property gave any "clue to ownership."⁴³ If there were no clue to the ownership the finder might appropriate it to his use without liability for larceny.

4. *Without Consent.*

The essence of common law larceny being a trespassory taking, the element of non-consent was vital. The leading Wisconsin decision for the proposition that dominion must be exercised without consent is *Topolewski v. State*.⁴⁴ Here the complainant learned of the defendant's intention to steal certain goods and instructed his employees to cooperate with defendant so that the defendant might be arrested and convicted of larceny. The plans made by the defendant were carried out, an employee putting goods on a loading platform and informing co-employees to permit the defendant to call for the goods and take them. Although the plan worked perfectly the court held that an element in the crime of larceny was lacking because the conduct of the complainant amounted to a consent to the taking. No effort to convict the defendant for an attempted theft was made in the case and that possibility remains open.

An interesting case for comparison is *United States v. Buck*,⁴⁵ decided by the United States Court of Military Appeals. The defendant approached one Hatley, a supply sergeant, and indicated his interest in securing a quantity of goods from government stocks. Hatley reported

⁴¹ *Clifton v. State*, *supra* note 36. Here the owner of musical instruments left them in a box outside the door of a saloon owned by him. Defendants discovered the box and took the box and instruments away. They subsequently pawned the box and instruments for three dollars. A conviction for larceny was affirmed. The court stated:

"They made no attempt to find to whom the instruments belonged, and did not even take the trouble to read the signs of the owners on his saloon. . . . Under this evidence, there is no room for the claim that the box and contents were lost or abandoned property."

⁴² See *Burns v. State*, *supra* note 16.

⁴³ *State v. Posey*, 88 S.C. 313, 70 S.E. 612 (1911); *McAllister v. State*, 206 Ark. 998, 178 S.W. 2d 67 (1944); *State v. Dean*, 49 Iowa 73 (1878).

⁴⁴ 130 Wis. 244, 109 N.W. 1037 (1906); *State v. Morey*, 2 Wis. 494 (1853) (non-consent should be proved by the testimony of the owner if possible); *State v. Moon*, 41 Wis. 684 (1877); *Baker v. State*, 88 Wis. 140, 155, 59 N.W. 570, 575 (1894); *Fetkenhauer v. State*, 112 Wis. 491, 88 N.W. 294 (1901); *Vought v. State*, 135 Wis. 6, 114 N.W. 518 (1908).

⁴⁵ 3 U.S.C.M.A. 341, 12 C.M.R. 97 (1953).

the defendant's plan to his superior officers as well as to the post legal officer and it was decided to follow the defendant's request in order to catch him in the act. Accordingly, the goods were placed at the door of the building. From here the defendant removed them, and, upon being apprehended was charged with larceny. His defense was "consent." The court cited and distinguished *Topolewski* by pointing out that no person involved here had any authority to dispose of the government-owned goods taken by the defendant. Armed service regulations conferred "neither expressly nor by implication" any authority to deliver the property in question. "Whether the officers and Hatley intended to surrender possession outright, or solely to catch an offender, their actions could not bind the government."⁴⁶

5. *The Mental Element in 943.20(1)a.*

The mental element required for a conviction under 943.20(1)a is expressed in two phases, (1) the act must be done "intentionally" and (2), must be done "... with intent to deprive the owner permanently of possession. . . ."⁴⁷ The former is explained in 939.23(3) and would require here that the defendant know that the property belonged to another and that his actions with respect to the property were without the consent of the owner. The latter provision is more complex and deserves further examination.

The Criminal Code here uses language conforming to the common law of larceny and many of the anomalies of the common law may continue to plague the courts. Larceny at common law requires an intent to deprive the owner permanently of possession, and therefore a claim of right or of intent to return the property was a defense.⁴⁸ An intent to return was not, however, a defense to embezzlement, nor is it now a defense to theft prosecuted under 943.20(1)b. An anomalous situation could still obtain. A bailee who misappropriated property, but intended to return it, may have a defense if the prosecution's proof is made pursuant to 943.20(1)a, but if the property and the defendant are within the ambit of 943.20(1)b it will not serve as a defense because the mental element under the latter section is an "intent to convert to

⁴⁶ *Ibid.* 3 U.S.C.M.A. 345, 12 C.M.R. 101; Compare *Reg v. Egginton*, (1801) 2 East, P.C. 666, *Stephen's Digest*, 326.

⁴⁷ The mental element described in the Criminal Code will be more difficult to manage than that set forth in the Proposed Code. The Proposed Code stated that the mental element required for stealing is an "intent to appropriate the property to his own use." This was further defined as "intent to exercise dominion over the property in a manner inconsistent with the rights of the owner." If the property were a chattel the requisite mental element would have been lacking if the "actor made no further transfer, and at the time, intended merely to use it, and to return it promptly." (Proposed Code, Sec. 343.20-(2)a). This simplified language was rejected by a majority of the Criminal Code Advisory Committee.

⁴⁸ *State v. Leicham*, 41 Wis. 565, 579-580 (1877); see also *Lechner v. Ebenreiter*, 235 Wis. 244, 292 N.W. 913 (1940); *Farrell v. Phillips*, *supra* note 26.

his own use." An intent to convert to one's own use involves a dominion less exclusive than an intent to deprive the owner permanently of possession. The person who takes an automobile of another merely for temporary use is not necessarily guilty of theft by this act. A specific statute was enacted to cover this misappropriation.⁴⁹

The Criminal Code does not deal specially with the person who helps himself to property offered for sale but who has an intention to pay promptly. *Mason v. State*,⁵⁰ an Arkansas decision, supplies an amusing example of such a situation. The complainant was a purveyor of beer. The defendants, long time acquaintances, late one Saturday night woke the complainant out of a sound sleep by calling for beer. Notwithstanding a refusal they entered the building and took a gallon of beer worth about thirty cents. A conviction for larceny was reversed by the court on the ground that the State had not fulfilled its burden to prove "... evidence of a design to deprive [complainant] of his property, or of an intention to take it without giving him a *quid pro quo* of equal value." The Model Penal Code offers a solution to this problem. It would provide:

Intent to pay for property does not preclude criminal liability for theft, except that a person who helps himself to property offered for sale or hire does not commit theft if he intends and is able to pay promptly.⁵¹

To prove the mental element the state need only show the intentional acts of taking and carrying away, transferring, using, concealing, or retaining. From this the jury may infer the requisite intent. Courts sometimes emphasize on appeal instructions that may be given to a jury. "The law presumes that a person intends the natural and probable consequences of his own acts but the presumption may be rebutted."⁵² The real question is simply whether the jury can infer an intention to deprive permanently from their consideration of all the acts proved by the state.

Proof that the defendant abandoned the taken property may be sufficient to show the requisite intent if the circumstances indicate an indifference to the owner's chance of regaining possession. In *Schroeder v. State*,⁵³ the defendants took two automobiles which several weeks later were found abandoned two counties away. The distance was emphasized no more specifically. The court sustained a conviction for larceny under the old law.⁵⁴ That statute said nothing whatsoever about

⁴⁹ WIS. STAT. §943.23 (1959).

⁵⁰ 32 ARK. 238 STAT. (1957).

⁵¹ Sec. 206.10, Tentative Draft #2.

⁵² *State v. Carlson*, 5 Wis. 2d 595, 604, 93 N.W. 2d 354, 359 (1958); *State v. Vinson*, 269 Wis. 305, 309, 68 N.W. 2d 712, 70 N.W. 2d 1, 4 (1955); Clark and Marshall, CRIMES, 6th ed. by Wingersky (1958) 730 *et seq.*

⁵³ 222 Wis. 251, 267 N.W. 899 (1936).

⁵⁴ WIS. STAT., §343.17 (1953).

the mental element and presumably directed the court to the common law. The court stated:

. . . there were clearly issues for the jury . . . and the evidence relied upon by the state fully warranted finding, beyond any reasonable doubt, that the defendants . . . feloniously took each of the automobiles without the owner's consent and against his will, with intent to convert it to the use of defendants. In doing that, the defendants clearly committed larceny * * * as to each automobile.⁵⁵

The language of *Schroeder* differs from the Code's description of the mental element, but there is no reason to believe that the Criminal Code intended a change in the law. What the Code as well as the decided cases appear to be doing is proscribing acts accompanied by the *intentional creation of an unreasonable risk of permanent loss* to the owner.⁵⁶ Accordingly, the jury may find the necessary element where the actor takes property for temporary use and abandons it under circumstances amounting to a "reckless exposure to loss." The criminal law must act upon probabilities and risks rather than upon hindsight.

To determine intent the jury must take into consideration all the evidence and it need not accept the defendant's declarations of intent. The Supreme Court of Wisconsin has stated:

. . . intent is a state of mind which can be evidenced only by the words or conduct of the person who is claimed to have entertained it. The jury was under no obligation to accept the direct evidence of intent furnished by the defendant, and must be permitted to infer intent from such of defendant's acts as objectively evidence his state of mind.⁵⁷

D. *Theft under 943.20(1)b.*

1. *General comments.*

Most of the pre-Criminal Code law of embezzlement is included in this section.⁵⁸ Because common law larceny required a taking out of the

⁵⁵ *Schroeder v. State*, *supra* note 53.

⁵⁶ Sec. 206.6, Model Penal Code, Tentative Draft #2, p. 88, Perkins, CRIMINAL LAW, 225.

⁵⁷ *State v. Kuenzli*, 208 Wis. 340, 347, 242 N.W. 147, 149 (1932); see also, *State v. Legg*, 243 Wis. 449, 10 N.W. 2d 187 (1943); *Mueller v. State*, 208 Wis. 550, 243 N.W. 411 (1932); *State v. Hintz*, 200 Wis. 636, 229 N.W. 54 (1930); *Adrian v. State*, 191 Wis. 193, 210 N.W. 367 (1926). Judge Learned Hand has expressed this poignantly:

"We have no ways of reaching each other's minds, but by the rude standard of assuming that men are alike, and checking the assumption by the appearance and demeanor of the individual. Perhaps there are better ways, but many a man has lost his liberty, and will lose it, for no better reason than because twelve ordinary men concluded that what most men would have believed he believed; because he could not convince them that he was egregious in this way or in that. This was a scheme which did, and on every sane theory must, fleece the unsophisticated. If these defendants thought otherwise, like all of us, they stood in peril to satisfy their peers of their obtusity. . . ." *Knickerbocker Merchandising Co. v. United States*, 13 F. 2d 544 (2d Cir. 1926).

⁵⁸ The prior law was in two sections.

Section 343.20 was the general embezzlement section. It set out a long list of

possession of the owner, an appropriation by a person in lawful possession became criminal only upon the passage of embezzlement statutes. These statutes were of limited coverage and did not affect all misappropriations by persons in lawful possession. The impact of 943.20(1)b is restricted as to persons and property affected.⁵⁹

Loss by embezzlement constitutes a major risk in business. In a single year it has been estimated American industry will lose about one billion dollars as a result of embezzlement and related crimes.⁶⁰ Compensation through insurance is frequently dependent upon proof that embezzlement occurred because of "mysterious disappearance" clauses. Accordingly the elements of this crime are of importance in civil law as well.

2. *Persons Affected by 943.20(1)b.*

This subsection applies only to persons bearing a particular kind of relationship to the object appropriated, and who bear a special responsibility toward the owner. The accused must have possession or custody by virtue of his "... office, business or employment, or as trustee or bailee. . . ." The persons to whom the law applies are denoted by a simple description of the relationship which they hold rather than by an extensive enumeration as given in the pre-Criminal Code provision. Some of these were:

... factor, carrier, warehouseman, storage, forwarding or commission merchant, or any bailee, executor, administrator, guardian, or any trustee, agent, clerk, attorney, messenger, employee or servant. . . .⁶¹

The long and involved list grew as more situations of the owner-possessor-property relationship were recognized, and legislation to cover their misappropriations was required. The Criminal Code covers the same persons but with language which describes in functional terms the

situations in which the actor in possession or custody of property could be guilty of embezzlement for misappropriating it. The actor had to come within a class of persons listed in the statute.

343.37, the section on fraud by corporation officers contained a provision reading: "Any director, officer or manager of a body corporate or public company who shall as such receive or possess himself of any money or other property of such body corporate or public company otherwise than in payment to him of a just debt or demand. . . ." Although this provision did not expressly require criminal intent, the actor probably would not have been found guilty if he were mistaken as to the debt or demand.

⁵⁹ The Proposed Code would have eliminated entirely the separate treatment of fiduciaries who misappropriated. The offense of "stealing" would have included one who:

"with intent to appropriate the property to his own use, intentionally takes, uses, transfers, conceals, or retains possession of the property of another without his consent. . . ."

⁶⁰ 37 HARVARD BUSINESS REVIEW 72 (1959).

⁶¹ WIS. STAT. §343.20 (1953): Listed also were government officials and corporate officers.

classes of persons included. The problem under the Criminal Code is to determine whether a person's functions permit him to be prosecuted under this subsection. If the actor bears the relation of debtor to his victim there will be no criminal liability under this subsection. However, there may be criminal liability if the misappropriating actor is a *bailee*. This distinction was not infrequently litigated under the old law, where courts demonstrated a tendency to look through the form and at the essence of the relationship beyond. The point to be emphasized is that courts and legislatures continue to be reluctant to take any path which will make criminal an ordinary breach of contract.

For the purposes of assessing criminal liability, the role of bailee has been broadly defined by Wisconsin courts.

If one, without the trespass which characterizes ordinary larceny, comes into possession of any personalty of another and is in duty bound to exercise some degree of care to preserve and restore the thing to such other or to some other person for that other, or otherwise account for the property as that of such other, according to circumstances,—he is a bailee. It is the element of lawful possession, however created, and duty to account for the thing as the property of another, that creates the bailment, regardless of whether such possession is based on contract in the ordinary sense or not.⁶²

In *Stecher v. State*,⁶³ the defendant engaged in a number of financial transactions in which he informed several complainants of investment possibilities. To induce one victim to part with money the defendant told him of an opportunity in Chicago in which the defendant planned to invest. In return for the sum of \$12,000 the defendant gave his notes and agreed to pay interest. The money was misappropriated and the defendant was convicted of embezzlement. On appeal the defendant contended that the relationship between him and his victim "was that of debtor and creditor rather than principal and agent or bailor and bailee." He argued that his promise to repay coupled with the obligation to pay interest was proof of the creditor-debtor relationship. The court in an opinion by Judge Rosenberry disposed of this contention by stating:

While the defendant went through the motions of paying interest and acting as if he had made the investments as he represented he would do, it is equally apparent that he never had any intention of making the investments. There is nothing in the record which required the trial court to make any such inference or which raises a reasonable doubt as to the nature of the transaction.⁶⁴

⁶² Burns v. State, *supra* note 16.

⁶³ 202 Wis. 25, 231 N.W. at 168 (1930).

⁶⁴ Stecher v. State, *supra* note 63 at 30, 231 N.W. at 170.

The *Stecher* case was distinguished in *Hanser v. State*⁶⁵ where the accused suggested to complainants that they join with him and go into the soap-making business. In return for money to finance the purchase of the needed facilities the defendant gave the complainants his note. A factory was purchased by defendant, but title thereto was taken in defendant's own name. The complainants demanded their interest in the property, but the defendant refused to convey it. Instead, in response to the demand of the complainants, the defendant gave the complainants notes signed by defendant's wife. The defendant was prosecuted for embezzlement as a bailee or trustee. A conviction for embezzlement was reversed, Judge Rosenberry again writing the opinion of the court.

It is elementary law that liabilities growing out of a debtor-creditor relationship cannot be made the basis of a charge of embezzlement. It is equally well settled that where a note is given not in good faith, but merely as a part of a fraudulent scheme of obtaining possession of money from another, the mere giving of the note does not determine conclusively the nature of the transaction [citing *Stecher*]. No circumstances at all comparable to those in the *Stecher Case* appear in this case. . . .

Upon the evidence there can be no doubt that the three men engaged in some sort of joint enterprise for their mutual benefit. The record is barren of any evidence which shows that the relationship between the defendant and [complainant] . . . was . . . anything other than that of debtor and creditor.⁶⁶

The fact that a person agrees to pay interest may be evidence of the relationship of debtor-creditor,⁶⁷ although the cases indicate that the courts will examine the transaction in question carefully in order to determine the true nature of the relationship.⁶⁸

Some difficulty has been encountered in determining the issue of whether a person can be convicted for the embezzlement of property held in trust not by himself but by a corporation or other entity in which the defendant plays an important role. In *Milbrath v. State*⁶⁹ the court sustained a conviction in the face of the defendant's claim that the criminal acts had been accomplished by a corporation, not by himself. The court emphasized the high degree of control exercised by the

⁶⁵ 217 Wis. 587, 259 N.W. 418 (1935).

⁶⁶ *Hanser v. State*, *supra* note 65 at 592-593, 259 N.W. at 419-420.

⁶⁷ *Milwaukee Theater Co. v. Fidelity & Casualty Co.*, 92 Wis. 412, 66 N.W. 360 (1896). In this case the treasurer of a corporation had \$6,000 in his possession upon which he agreed to pay 6% interest. When his job as treasurer terminated he failed to pay the \$6,000 on demand. This was held not to constitute an embezzlement on the ground that: "There can be no embezzlement unless the property charged to have been embezzled was, at the time of the conversion, held in trust."

⁶⁸ See also *State v. McFetridge*, 84 Wis. 473, 505, 54 N.W. 1, 7 (1893) wherein the legal title of monies paid to the state treasurer was held to lie with the state.

⁶⁹ 138 Wis. 354, 120 N.W. 252 (1909).

defendant over the corporate activities (the defendant was president and four-fifth owner of the stock) and concluded:

... in a criminal prosecution against a person charged with an offense committed by him against the laws of the state he could not be heard to say in justification that he committed that offense in his official capacity as officer of a corporation; nor could he assert that acts in forum corporate acts were not his acts merely because carried out by him through the instrumentality of a corporation which he controlled and dominated in all respects and which he employed for that purpose.⁷⁰

The *Milbrath* case was distinguished in *Weber v. State*.⁷¹ In the latter case the defendant, a young man of 27, was secretary-treasurer and vice-president of a real estate and loan company. He was only a nominal stockholder, and had achieved his position by promotion from the position as a stenographer and office boy. Complainants paid certain sums to the company through the defendant for the purpose of paying off debts due to third parties. The funds were deposited in the company's general accounts and in violation of the obligation were not used for the purposes directed. After the bankruptcy of the company the defendant was prosecuted for embezzlement. The conviction was reversed, the court emphasizing the subordinate position held by the defendant rather than the power implied by his title.

3. Possession or custody "by virtue" of such office.

To convict under 943.20(1)b the prosecution must prove not only the special relationship but also that defendant "by virtue of his office . . ." had possession or custody of the matter appropriated. The statute here incorporates language found in the prior law.⁷²

In *Sprague v. State*,⁷³ the defendant who had connections with a bank abstracted bank funds with the intent to defraud the bank. He was convicted under the special theft statute pertaining to banking officers.⁷⁴ This statute differs from the embezzlement statute in that for

⁷⁰ 138 Wis. at 364-365, 120 N.W. at 256.

⁷¹ 190 Wis. 257, 208 N.W. 923 (1926); accord, *Kralovetz v. State*, 191 Wis. 374, 211 N.W. 277 (1926). Judge Rosenberry dissented in the *Kralovetz* opinion although he had concurred in *Weber*. In the former case he states:

"... if it is to be held, as it seems to me it is held in the present case, that an employee of a corporation who, by virtue of such employment, is entrusted with the disbursement of money, fraudulently converts it to the use of the corporation of which he is an employee, is not guilty of embezzlement, I cannot concur in that view." (191 Wis. at 378, 211 N.W. at 278).

The majority did not contravene this, but merely relied on the *Weber* holding. On the law Judge Rosenberry's point seems well taken.

⁷² WIS. STAT. §343.20 (1953).

⁷³ 188 Wis. 432, 206 N.W. 69 (1925).

⁷⁴ WIS. STAT. §221.39 (1959) now provides:

"Every president, director, cashier, officer, teller, clerk or agent of any bank or mutual savings bank who steals, abstracts or willfully misapplies any of the moneys, funds, credits, or property of the bank or mutual savings

the latter the state would have to show that the defendant had lawful custody of the funds.

The same problem arose in *State v. White*,⁷⁵ where the defendant was comptroller of the City of Milwaukee. He had possession of 100 municipal bonds, 92 of which he issued to persons authorized to receive them, but the other eight he pledged as security for a personal loan. On appeal from a conviction for embezzlement the defendant argued that he did not have possession of the bonds by "virtue of such office or employment." To sustain the conviction the Court had to make a lengthy analysis of the duties of the comptroller and concluded:

His duty to make an accurate record of the bonds issued, rendered it absolutely necessary that he should have the custody of them after they were ready for issue to make such record, and it would certainly be convenient, if not absolutely necessary, that he should retain such custody until they were delivered to the persons entitled to them, in order to make the accurate account of issuing the bonds as required by law.⁷⁶

The lesson of the *White* case is that the Courts will consider the broad nature of a person's office or employment and consider such matters as business or governmental convenience to determine whether custody or possession is "by virtue" of such office.

4. *Property Affected.*

943.20(1)b limits the object of the offense to "... money or a negotiable security, instrument, paper or other negotiable writing. . . ." Thus it would appear that a person, in lawful possession of a valuable stamp collection lent to him by a friend, who subsequently converts the collection to his own use by transferring valuable stamps from the collection to his own collection will not be guilty of a criminal offense under 943.20(1)b.⁷⁷ The property affected by 943.20(1)b is matter which by virtue of its highly transferable characteristics may be easily lost unless

bank, whether owned by it or held in trust, or who, without authority of the directors, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment or decree; or who makes any false entry in any book, report or statement of the bank with intent in either case to injure or defraud the bank or mutual savings bank or any person or corporation, or to deceive any officer of the bank or mutual savings bank, or any other person, or any agent appointed to examine the affairs of such bank or mutual savings bank; or any person who, with like intent, aids, or abets any officer, clerk, or agent in the violation of this section, upon conviction thereof shall be imprisoned in the state prison not to exceed 20 years."

⁷⁵ 66 Wis. 343, 28 N.W. 202 (1886).

⁷⁶ *State v. White*, *supra* note 75 at 354; see also *State v. McFetridge*, *supra* note 68.

⁷⁷ Authority for sustaining a conviction even under the old law may be found in the "breaking bulk" cases, or in the larceny by trick cases—see the famous *Pear's Case*, 1 Leach 212, 168 Eng. Rep. 208 (1779). The defendant who wrongfully conceals or withholds the property of another with an intent permanently to deprive the owner of possession appears to be within the ambit of 943.20 (1)a.

the criminal law accords to it a greater degree of protection. The property affected is defined in terms of its negotiability thus not permitting the application of the section to other freely transferable items.

5. *Of Another*.⁷⁸

If the funds taken are held on loan they are not, of course, the property "of another." In *State v. Legg*,⁷⁹ the defendant, charged with embezzling \$170 delivered to him by the complainant, claimed that the money was turned over to him as a loan. This would have been a defense if he could have so shown.⁸⁰ The offense specified by 943.20(1)b is against the property "of another."

The criminal law in some jurisdictions has distinguished between withholding money which belongs to another and failing to pay money which is due to another. *Commonwealth v. Mitchneck*, a Pennsylvania decision, is a leading case.⁸¹ Employees of Mitchneck, a mine operator, authorized him to deduct from the wages amounts due on grocery bills. Mitchneck was to pay the grocer the sums due, but he did not, although he did make the deductions. The Pennsylvania statute punished persons who:

having received or having possession, in any capacity . . . any money . . . *of or belong to another* . . . , fraudulently withholds, converts, or applies the same . . . to and for his own use or benefit . . . (Emphasis supplied.)

The Court reversed the conviction on the ground that Mitchneck did not have in his possession "any money belonging to his employees." Mitchneck's obligation, said the Court, was a civil one due to his employees or to the grocer. If one determines that there would have been liability if the employees after drawing their pay had given the money to Mitchneck for the purpose of paying the grocer, the case emphasizes a needless fiction. In the latter situation a trust relationship would have been clear enough to allow a conviction for embezzlement.⁸² The Wisconsin Criminal Code could properly be construed to punish such persons as Mitchneck in view of the clause in 943.20(1)b concerning the "... office, business or employment . . ." of the defendant. Mitchneck was in a real sense "employed" by his own employees to set aside, either physically or on account books certain sums for a particular purpose. The employees themselves assumed none of the risks frequently attendant upon professional lenders, and it was not contemplated that Mitchneck hold the money for any length of time or for any use to his own benefit.

⁷⁸ See discussion under 943.20(1)a. *supra*.

⁷⁹ 243 Wis. 449, 10 N.W. 2d 187 (1943).

⁸⁰ *Id.* at 189; see also *Milwaukee Theater Co. v. Fidelity & Gas Co.*, *supra* note 67.

⁸¹ 130 Pa. Super. 433, 198 Atl. 463 (1938), see also *State v. Polzin*, 197 Wash. 612, 85 P2d 1057 (1939) discussed in Appendix C, Model Penal Code, Tentative Draft #1; see also Comment to 206.4, Tentative Draft #2.

⁸² *Cf. State v. Polzin*, *supra* note 81.

It was not a "credit" transaction and in a very real sense he held the money "of another." It was expected that Mitchneck would retain a specific amount of cash as immediately available for a particular purpose. In Wisconsin the courts even prior to the Criminal Code demonstrated a tendency to look not only at the form but at the essence of the transaction.⁸³

6. *Requisite Action.*

The requisite action for a conviction under 943.20(1)b is an intentional *use, transfer, concealment or retention* of specified property without the owner's consent. The behavior described in 943.20(1)b amounts to dealing with property as if it were the actor's own. It is the purpose of the Criminal Code to proscribe such a conflict with the right of the true owner.⁸⁴

In *Milbrath v. State*,⁸⁵ the Court was careful to emphasize that the test of requisite action for embezzlement was *not* the benefit to the defendant,⁸⁶ but the use by the defendant. The fact that the property was held in trust by a corporation of which the defendant was an officer and director and used for the benefit of the corporation does not preclude the defendant from being held responsible for an embezzlement.⁸⁷

So long as the person's actions are within the scope of his duties as they are defined by law or by agreement there is no violation of 943.20(1)b, although he may intend at some future time to convert the funds to his own use.⁸⁸ In *State v. McFeteridge* the Court stated:

The deposits having been made for the benefit of the state, by the state treasurer in his official capacity, in due course of business, with the intention, afterwards executed, to pay the amounts thereof to the persons lawfully entitled thereto, the intention formed in his mind to retain to his own use any interest the bank might thereafter pay him on account of such deposits is not sufficient to characterize the act of making such deposits as a conversion to his own use of the funds thus deposited, and an embezzlement thereof.⁸⁹

⁸³ *Stecher v. State*, *supra* note 63.

⁸⁴ Sec. 206.4 Model Penal Code, Tentative Draft #2, states: Thefts by Failure to Make Required Disposition of Funds Received. (1) *In General*. A person who obtains property upon agreement, or subject to a known legal obligation, to make specified payment or other disposition, whether from such property or its proceeds or from his own property in equivalent amount, commits theft if he deals with the property obtained as his own and fails to make the required payment or disposition, unless the actor proves that his obligation in the transaction was limited to a promise or other duty to be performed in the future without any present duty to reserve property for such performance. . . ." (emphasis supplied)

⁸⁵ *Supra* note 69.

⁸⁶ 138 Wis. 354 at 363, 120 N.W. at 255, see also *State v. Sanders*, 127 Kan. 481, 274 Pac. 223 (1929) *dicta*.

⁸⁷ 138 Wis. 354 at 364.

⁸⁸ *State v. McFeteridge*, *supra* note 68 at 8-9.

⁸⁹ *State v. McFeteridge*, *supra* note 68 at 9. An intent to appropriate accompanied

7. *Without Consent.*

The requisite action must have been done "without the owner's consent." Consent therefore is a defense under 943.20(1)b just as it was under the prior law. "Without consent" is defined in 939.22(48).

In *Guenther v. State*,⁹⁰ the defendant was accused of embezzling from his employer. Among the defenses was the claim that at the time of his employment he was told that his employer "doesn't want his men to be living in poverty, so if you need a little money—at first you may need some of the money used for sales and pay it back when you are able." The Court held this was not consent to an appropriation of \$850. "It at most authorized trifling applications of moneys . . . and not a diversion of large sums. . . ."⁹¹

8. *The Mental Element in 943.20(1)b.*

The gravamen of the theft described in 943.20(1)b is described as the defendant's ". . . intent to convert to his own use or to the use of any other person except the owner." It is quite different from the intent required by subsection (1)a for under subsection (1)b the risk of loss to the owner of money or negotiable instruments is decidedly greater because of their easily disposable quality. An intention to return, therefore, a defense under subsection (1)a, is no defense to theft under subsection (1)b.⁹² In this respect the Criminal Code is in accord with prior law, and cases decided thereunder are helpful.⁹³

The prior statute referred to a conversion to the defendants ". . . own use or to the use of any other person except the owner . . ."⁹⁴ and the Criminal Code was amended during the 1959 session to embrace the language of the old law. Such a conversion may occur when the actor transfers the property for the benefit of another, uses or withholds the property, or intentionally takes any other action for the purpose of depriving the owner of the property.

A technical conversion, although it may be sufficient to constitute requisite action, may not by itself be an indication of an intent to appropriate to the use of the actor. The jury is entitled to consider all circumstances. In *State ex rel Kropf v. Gilbert*,⁹⁵ a trustee corporation sold certain securities of a client before being authorized to do so. The act, sufficient to fulfill the demands of the embezzlement statute, was held not criminal so long as the proceeds obtained were kept for the client.

by a concealment of the property may be sufficient, see *State v. Holley*, 115 W.Va. 464, 177 S.E. 302 (1934).

⁹⁰ 137 Wis. 183, 118 N.W. 640 (1908).

⁹¹ *Id.* at 188, 642.

⁹² *Glasheen v. State*, 188 Wis. 268, 205 N.W. 820 (1925); *State v. Pratt*, 114 Kan. 660, 220 Pac. 505 (1923).

⁹³ See *McGeever v. State*, 239 Wis. 87, 300 N.W. 485 (1941); *Podell v. State*, 228 Wis. 513, 273 N.W. 653 (1938); *Mueller v. State*, *supra* note 57.

⁹⁴ Wis. STAT. §343.20 (1953).

⁹⁵ 213 Wis. 196, 251 N.W. 478 (1933).

Embezzlement did occur upon the subsequent conversion of the funds to the use of the trustees. In *Adrian v. State*,⁹⁶ an agent deposited to his own account funds belonging to the principal contrary to the terms of his obligation. The Court affirmed a conviction for embezzlement, but in deliberate dicta indicated that a mere technical conversion would not supply that element of fraud necessary for embezzlement. The Court stated:

The mere deposit by an agent in the ordinary course of business of funds belonging to a principal in his own bank account and so intermingling it with his own funds undoubtedly amounts to a technical conversion . . . but it may lack the element of fraud necessary to constitute a fraudulent conversion.

The present Code does not refer to fraud as necessary for a conviction under 943.20(1)b. It does not follow, however, that the Code differs here from the prior law. The element of fraud was recited in the prior law and in cases because of the natural unwillingness of Courts to make an ordinary breach of contract the basis for criminal liability. The old statute required that the State prove an element of "fraud" in order to prevent such a result. In *State v. Kuenzli*,⁹⁷ the Court said:

The evidence is undisputed that the defendant deposited the money in his own account, and that he thereafter used the money for his own benefit. It is true that whether these acts on the part of the defendant constituted mere conversion or embezzlement depends upon the intent with which they were done.

The *Kuenzli* case teaches that an *intentional* conversion is necessary. The mere use of the funds, in the absence of an *intentional* use is not enough. However, from a use of funds a jury may infer the deliberate and intentional element required. The old law permitted an inference of a fraudulent and felonious intent on the basis of an intentional use,⁹⁸ but the Criminal Code eliminates this technicality and merely requires that the jury consider all the facts and circumstances before it can conclude that there was an *intentional conversion to the defendant's use*. 943.20(1)b thus recites the mental element in a manner more precise, but no different in effect, than the common law. Confusion arising from the phrase "fraudulent and felonious" is eliminated.

To "convert to his own use" the defendant must be more than negligent or careless. What was said under the old embezzlement statute obtains equally under the Code.

A man may do things irregularly; he may do poor bookkeeping; he may be very careless; he may sign a receipt, as he did here,

⁹⁶ *Supra* note 57.

⁹⁷ *Ibid.* note 5.

⁹⁸ *State v. Legg*, *supra* note 57; *Lochner v. State*, 218 Wis. 472, 261 N.W. 227 (1935); *Mueller v. State*, *supra* note 57; *Glasheen v. State*, *supra* note 92; *State v. Leicham*, 41 Wis. 565, (1877).

for money which, concededly, he never received; he may even be guilty of malfeasance in office, of failure to properly keep the accounts and to make daily entries and so on as 59.73 provides, but you cannot convict him of embezzlement for that.⁹⁹

9. *Proof of Intent.*

The jury may infer the necessary intent from the actions of the accused subsequent to the "use" of the property. In *Adrian v. State*,¹⁰⁰ the defendant deposited funds of his principal in the defendant's own account, withdrew the entire amount and left the state. These actions permitted the jury to find that he had converted the funds to his own use with the "evident purpose of depriving the beneficiary of his rights."¹⁰¹

The defendant in *State v. Kuenzli*,¹⁰² was an attorney who collected an account on behalf of a client and deposited the check received as payment in his own bank account. Defendant claims that he waited a few days to determine whether the check was good and upon finding that it was, he also discovered that his bank account was insufficient to pay the client. A conviction for embezzlement was sustained, the Court holding:

The jury was under no obligation to accept the direct evidence of intent furnished by the defendant, and must be permitted to infer intent from such of defendant's acts as objectively evidence his state of mind. It seems clear to us that the deposit and subsequent use of the funds by defendant for his own benefit may properly form the basis for an inference of felonious intent.¹⁰³

That the defendant acts openly with the property and with the knowledge of the true owner may be evidence of the lack of an intent to convert.¹⁰⁴ It is also, of course, relevant to determine whether the defendant fled following the use.¹⁰⁵ It is not a defense to show that the defendant did not in fact benefit himself, for the test is whether the the defendant converted to his own use, not to his own benefit.¹⁰⁶ Loose language in some decisions referring to the intent of the defendant to "benefit" himself can be found. It is true, of course, that in the majority of cases the defendant's intent to benefit himself was the reason for the taking, but this does not mean that a benefit to the defendant is an essential element of the crime.

⁹⁹ *State v. Witte*, 243 Wis. 423, 436, 10 N.W. 2d 117, (1943).

¹⁰⁰ *Supra* note 57.

¹⁰¹ *Adrian v. State*, *supra* note 57 at 197; *accord*, *Stecher v. State*, *supra* note 63 at 30, where the Court stated "It is sufficient evidence of unlawful conversion to show as in these cases that the defendant absconded, following efforts of the complainants to procure a settlement with him."

¹⁰² *Supra* note 97.

¹⁰³ *State v. Kuenzli*, *supra* note 57 at 347.

¹⁰⁴ *Hanser v. State*, 217 Wis. 587, 591, 259 N.W. 418 (1935).

¹⁰⁵ *Adrian v. State*, *supra* note 57 at 193; *Stecher v. State*, *supra* note 63 at 30.

¹⁰⁶ *Milbrath v. State*, *supra* note 69; see also *State v. Witte*, *supra* note 99 at 435.

In *State v. Davidson*,¹⁰⁷ a conversion sufficient to sustain a conviction for embezzlement was proven by showing that funds were deposited in defendant's personal account, intermingled with his funds, or not turned over to the owner in accordance with defendant's obligation.¹⁰⁸ On the other hand in *State v. Witte*,¹⁰⁹ a conviction for embezzlement was reversed on the ground that an intent to convert was not established. In this case the accused, a clerk of courts, was shown to have kept inaccurate records, and a shortage was discovered after an audit. However:

It was not shown on the part of the state that the defendant expended any of the money for his personal use. No checks were drawn on the funds deposited in the name of the county to the defendant . . . or to any person for the use of the defendant. . . . All checks were properly issued for payments legally payable from those funds.¹¹⁰

It was further shown that defendant made no false entries, requested an audit to be made, appointed a new deputy when the old one proved incompetent, and had the safe combination changed after his superior had neglected to do so.

10. *Prima facie evidence under 943.20(1)b.*

The last sentence in 943.20(1)b provides that a ". . . refusal to deliver . . ." items specified ". . . upon demand of the person entitled to receive it, or as required by law, is prima facie evidence of an intent to convert to his own use. . . ." Except that the prior statute referred also to a "wilful neglect" to deliver, this provision is identical in effect to the pre-code law.¹¹¹ The refusal to pay on demand is only prima facie evidence of a conversion; the accused may rebut the presumption by proof of circumstances that would disprove the conversion.¹¹² Of course a demand is not a condition precedent for prosecution.

If certain facts are made prima facie evidence of a crime this permits the inference of an element of the crime from the facts. The facts will thereby constitute evidence which should be considered by the jury together with other evidence in determining whether they are convinced beyond a reasonable doubt of the defendant's guilt.¹¹³

E. *Theft under 943.20(1)c.*

Subsection (1)c proscribes the conduct of a person who having a legal interest in movable property, takes it out of the possession of an-

¹⁰⁷ 242 Wis. 406, 8 N.W. 2d 275 (1943).

¹⁰⁸ *Id.* at 413.

¹⁰⁹ *Supra* note 106.

¹¹⁰ *State v. Witte*, *supra* note 99 at 435.

¹¹¹ See Wis. STAT. §343.21 (1953).

¹¹² *Glasheen v. State*, *supra* note 92.

¹¹³ *Spaulding v. Chic. & N.W. Ry. Co.*, 33 Wis. 582 (1873); 1953 Leg. Council Rep. 129.

other with superior right of possession. He must act with intent to defeat the other's interest in the property, or must believe that his act will effect a permanent deprivation of another of a superior right of possession.

An illustration of how this section might work is supplied by a Minnesota decision, *State v. Cohen*.¹¹⁴ The defendant was the owner of a Hudson seal fur coat which was delivered to the complainant, a furrier, for alterations. A fictitious name was given by the owner's husband at the time of delivery, and when the coat was ready the defendant refused to pay. The furrier refused to deliver the coat without payment, and there matters stood for several weeks. After repeated efforts to get paid the furrier took the coat to defendant's home. Defendant took the coat for the announced purpose of trying it on before a mirror; the furrier was left waiting at the door. The defendant in response to repeated requests refused to pay for the alterations or return the coat to the furrier. On this evidence the Court sustained a conviction for larceny on the ground that the evidence could disclose an intention to deprive the furrier of his lien. Hence a person can be guilty of larceny where the object taken is his own property if another has a superior right to possession, and if the taking is intended to result in a deprivation of that right.¹¹⁵

The requisite act under 943.20(1)c is a taking of unauthorized control by taking possession. The common law is in accord because of the definition given to property "of another." "Of another" has referred to possession rather than to title or ownership.¹¹⁶

F. *Theft under 943.20(1)d.*

This subsection embodies the common law crime of obtaining by false pretenses, although in one respect the new statute covers behavior not within the common law definition. The simplification achieved by subsection d enabled the legislature to repeal several troublesome statutes.¹¹⁷ 943.20(1)d deals with theft by deceit, as distinguished from

¹¹⁴ 196 Minn. 39, 263 N.W. 922 (1935). See also cases cited in Clark and Marshall, *LAW OF CRIMES* (6th ed. by Wengersky 1958) 725.

¹¹⁵ *State v. Williamson*, 74 Wis. 263, 42 N.W. 111 (1889).

¹¹⁶ See Perkins, *CRIMINAL LAW*, 196 (1957).

¹¹⁷ Obtaining property by false pretenses. The following sections dealt with the crime of obtaining by false pretenses and related offenses. The new section differs from the old law on false pretenses in that a promise made with intent not to perform it is now included, *if it is part of a false and fraudulent scheme*.

343.24 False pretenses; personating another; penalty, 343.25 Obtaining money by false pretenses; penalty, and 343.253 Mendicant impostors all dealt with obtaining property by false pretenses or false personation.

343.31 Gross fraud provided a penalty for a gross fraud or cheat at common law. Those common-law crimes dealt with obtaining property by means of fraud which affected the public—false weights and measures for example.

343.32 Sale of land without title prohibited executing a deed of land to which one had no title—a false representation that the person owned the land.

343.341 Manufacture and distribution of cheating tokens, etc.; Subsection

theft by stealth. Hence the element of trespass, a requisite of common law larceny, is not present. Absent also is the lawful possession of custody present in the crime of embezzlement (and in 943.20(1)b).

1. *Obtains Title to Property.*

The actor must "obtain title" to the property of another. This requirement is a carry over from the old law which required that the victim relinquish property intending to transfer not only possession but title also. Accordingly, a person might or might not be guilty of a crime if he obtained the property by a false promise, depending on whether he obtained title to the property or only possession of it. The crime of false pretenses required that the actor obtain title to the property.¹¹⁸

The rule was stated in forceful terms in *Bates v. State*,¹¹⁹ and *State v. Burke*¹²⁰—as long as the defrauded party retained either title or control over the property the crime of obtaining by false pretenses was not consummated. This requirement was qualified in *Whitmore v. State*,¹²¹ wherein the Court stated:

The rule stated in the *Bates* and *Burke* Cases is not founded upon a specific requirement in the statute that title pass, but is for the purpose of preserving a distinction between the crime of larceny by bailee and that of obtaining money by false pretenses. . . . Where . . . goods are sold under a conditional sales contract and the legal title is retained for purposes of security, the vendee gets a sufficient property interest to support a conviction of ob-

(2) prohibited the use of anything except lawful money in any receptacle used for deposit of coins, with intent to defraud. If he obtained a candy bar or a package of cigarettes, he would be guilty under subsection (1)(a) because technically he obtains the property without the consent of the owner, since his consent is given only to the taking in return for lawful money.

343.35 False pretense as to heirship penalized anyone pretending that a child was of certain parents in order to obtain an inheritance to which the child of those parents would be entitled. This was a specific attempt to steal and if property is obtained by this false representation, the actor is guilty of theft under the new section; if no property is obtained, but the actor does the acts prohibited he probably is guilty of an attempted theft.

343.405 Fraud on life insurance company penalized anyone who absconded or concealed himself to obtain the proceeds of a life insurance policy; it even penalized the taking out of a policy with intent to abscond or conceal oneself to obtain the proceeds of the policy. If the actor does obtain property by such false representation, he is clearly guilty of theft. If he absconds or conceals himself and his intent to procure the proceeds of the policy can be proved beyond a reasonable doubt he may be guilty of an attempt under section 939.32. Otherwise such conduct is not sufficiently dangerous to be criminal.

343.41 False statements; penalty dealt with the making of false financial statements in order to obtain bonds, credit or the extension of credit and provided that, if such statement was relied on and actual financial loss sustained, a punishable offense was committed.

343.571 Warehouse receipts, frauds respecting, prohibited the use of false warehouse receipts, or of genuine warehouse receipts with false conditions on them, to obtain several types of specified property.

¹¹⁸ *Brockman v. State*, 192 Wis. 15, 211 N.W. 936 (1927); *State v. Kube*, 20 Wis. 229 (1886).

¹¹⁹ 124 Wis. 612, 617, 103 N.W. 251 (1905).

¹²⁰ *Supra* note 6.

¹²¹ 238 Wis. 79, 298 N.W. 194 (1941).

taining money by false pretenses provided the other requisites of the offense are present.¹²²

Although the Criminal Code explicitly refers to the necessity for title to be obtained this should not be taken to mean that one must obtain absolute title, because any title obtained by fraud is voidable and the requirement if applied literally would make it impossible for the crime to be consummated.¹²³ The *Whitmore* case adopted this reasoning in sustaining a conviction of a defendant who purchased with a bad check an automobile on a conditional sales contract, in which title was reserved in the vendor.¹²⁴

The result in *Whitmore* appears to be sensible for it goes to the heart of the law of theft and proscribes the obtaining of *unauthorized control*. Language of title is a misleading relic of distinctions no longer significant. In view of the *Whitmore* case the maxim *cessante ratione legis, cessat et ipsa lex* could be applied, and the courts could properly concern themselves with the unauthorized control exercised by the defendant.

The requirement refers to obtaining title to property.¹²⁵ Hence it is not criminal under this subsection to induce another to render personal services by false representation,¹²⁶ or to induce another to extend credit.¹²⁷ Criminal liability, if any, must be founded on other sections of the code or statutes.¹²⁸

2. *Victim must be deceived.*

The victim must in fact be deceived.¹²⁹ It makes no difference that the victim was careless to the point of stupidity and that the deception would not have fooled a reasonable man. In *Palotta v. State*,¹³⁰ the Court stated that the theft statutes were designed to protect "the unwise and credulous as well as the able and the vigilant."¹³¹ While it may be

¹²² *Id.* at 82, 195.

¹²³ *Chappell v. State*, 216 Ind. 666, 25 N.E. 2d 999 (1939); Clark and Marshall, *LAW OF CRIMES* (6th ed. 1958) 818; Perkins, *CRIMINAL LAW*, 260 (1957).

¹²⁴ *Cf. La Porte Motor Co. v. Fireman's Ins. Co.*, 209 Wis. 397, 245 N.W. 105 (1932) wherein it was held that the vendee of an automobile by a conditional sales contract cannot be guilty of larceny of the automobile even though in default under the conditional sale.

¹²⁵ Defined broadly in 943.20(2)a; see *Clawson v. State*, 129 Wis. 650, 109 N.W. 578 (1906) (a promissory note); *State v. White*, 66 Wis. 343, 28 N.W. 202 (1886) (unissued city bonds), 24 Op. Atty. Gen. 145 (1935).

¹²⁶ *State v. Black*, 75 Wis. 490, 44 N.W. 635 (1890), 4 Op. Atty. Gen. 811, 12 Op. Atty. Gen. 132, 5 Op. Atty. Gen. 376.

¹²⁷ *Pepin v. State ex rel Chambers*, 217 Wis. 568, 259 N.W. 410 (1935); *Lochner v. State*, *supra* note 48.

¹²⁸ See 943.21 Fraud on Hotel or Restaurant Keeper; 943.38 Forgery, or 943.39 Fraudulent Writing.

¹²⁹ *Corscot v. State*, 178 Wis. 661, 190 N.W. 465 (1922).

¹³⁰ 184 Wis. 290, 199 N.W. 72 (1924).

¹³¹ *Id.* at 294, 74, rejecting the principle announced in *State v. Green*, 7 Wis. 676 (1859) and *State v. Kube*, *supra* note 118. See also *State ex rel Hull v. Larson*, 226 Wis. 585, 277 N.W. 101 (1938) wherein the victim, Dane County,

that the representation is so utterly absurd that no person could possibly be deceived and the court might so rule, if it in fact is disclosed that the victim was deceived this will fulfill the requirement.

Not only must the victim be deceived, but he must be deprived of something as a result of the deception. In *Whitmore v. State*,¹³² the defendant claimed that the state must prove that the victim parted with the property in sole reliance upon the false pretense. The Court rejected this contention and stated that it is sufficient "if the pretense was one of the material matters relied upon."¹³³

The reliance of the victim may be inferred by the jury if the false representations are proved and the requisite intention to deceive is established.¹³⁴ However, it does not appear to be essential that the victim suffer an actual property loss.¹³⁵ A conviction for false pretenses was sustained in *Nelson v. United States*.¹³⁶ The defendant, a television retailer, purchased television sets worth \$272 on credit. The purchase price was secured by a chattel mortgage and a car in which the defendant claimed a four thousand dollar interest. The car in fact had a lien upon it and was worth only one thousand dollars to the defendant. Although the complainant suffered no monetary loss at the time of the misrepresentations the Court held that false pretenses obtained because the complainant was deprived of his right to bargain with all the facts before him.

3. A False Representation.

A significant enlargement upon the crime of false pretenses is made by 943.20(1)d and should be remarked. A false representation now "... includes a promise made with intent not to perform if it is part of a false and fraudulent scheme."¹³⁷ The old dogma was that a promise of future action did not constitute false representation, but a single sentence reduces this rubric to a state of limbo.¹³⁸ "A mere naked prom-

was deceived because of the negligence of its agents. A conviction was sustained.

¹³² 238 Wis. 79, 298 N.W. 194 (1941).

¹³³ *Id.* at 82, 195; accord *State ex rel Brill v. Spieker*, 271 Wis. 237, 242, 72 N.W. 2d 906 (1955).

¹³⁴ *Corscot v. State*, *supra* note 129.

¹³⁵ *cf. State v. Hintz*, 200 Wis. 636, 229 N.W. 54 (1930) where defendant falsely represented that soil was clay and loam when in fact it was poor quality white sand. Complainant gave defendant a mortgage relying upon the representation as to the quality of the soil. The record indicated that defendant intended to pay the mortgage. The Court reversed and ordered a new trial on the ground that there was serious doubt as to defendant's guilt. Where there is evidence that defendant did not intend to cause the victim loss, there may be a discretionary reversal under Section 251.09.

¹³⁶ 227 F. 2d 21 (D.C. Cir. 1955) noted 65 Yale L. J. 887 (1956).

¹³⁷ Wis. STAT. §943.20(1)d (1959). This is not one of the better drafted provisions. It appears to be a compromise with the Proposed Code provision which simply referred to a "promise made with an intent not to perform it." The revision emphasizes that simple breach of contract is not grounds for criminal liability; Minutes of the Criminal Code Advisory Committee, 17 June 1955.

¹³⁸ *State ex rel Labuwi v. Hathaway*, *supra* note 7; *Frank v. State ex rel Meiers*,

ise to do something in the future . . . is not sufficient to constitute a false pretense."¹³⁹ So stated the Supreme Court prior to the Criminal Code by this limitation indicating their unwillingness to make what they considered a mere breach of contract the basis for criminal liability.¹⁴⁰ To accomplish their purpose courts relied upon shaky authority,¹⁴¹ and accepted distinctions having only verbal clarity.¹⁴²

The phrase of 943.20(1)d "... a false and fraudulent scheme . . ." was suggested to the draftsmen by the opinion of the Supreme Court of Illinois in *Chilson v. People*.¹⁴³ This was a prosecution for the crime of obtaining money by means of a confidence game. The complainant was induced to enter into a contract with Chilson to form a partnership to sell real estate in Milwaukee. The complainant paid several hundred dollars for certain lots on the strength of Chilson's representations. Promises made by Chilson were never performed and there was ample evidence to indicate that he had never intended to perform them. Chilson's plea that he had been convicted for mere failure to carry out a plain civil contract was rejected by the Court, which stated:

If [defendant] had entered into the contract in good faith his reasoning would be inclusive. Where a contract apparently legal is entered into by one party with the intention of taking no step to carry it out, but with the wrongful intention of causing the other to part with his money without receiving adequate consideration thereof, such contract may, and in this case did, become a mere incident of the '*false and fraudulent scheme*.' . . . The fact that the affair was made to assume the guise of an ordinary business transaction . . . is without significance. It is the substance, and not the form, that is material.¹⁴⁴ (Emphasis supplied.)

The Wisconsin Code accords with several other recent efforts to reform the criminal law by punishing those who acquire property of another by a promise made with intent not to perform.¹⁴⁵

244 Wis. 658, 12 N.W. 2d 923 (1944); *Corscot v. State*, *supra* note 129; 2 Op. Atty. Gen. 281 (1934). Although the doctrine is parroted in thousands of cases, the poverty of its origin has been established, see Pearce, *Theft by False Promise*, 101 U. Pa. L. Rev. 967, 978 (1953). It has been rejected in Rhode Island, *State v. McMahon*, 49 R.I. 107, 140 Atl. 359 (1928), and in the federal courts, see *Durland v. United States*, 161 U.S. 306, 313 (1896).

¹³⁹ *State ex rel Labuwi v. Hathaway*, *supra* note 7.

¹⁴⁰ This seems to be the best explanation of the earlier decisions many of which could as easily be decided on the lack of evidence of criminal intent i.e., *Rex v. Goodall*, 168 Eng. Rep. 898 (1821, Crown Cases Reserved).

¹⁴¹ See *State v. Green*, *supra* note 131, which cited *Commonwealth v. Drew*, 19 Pick. 179 (Mass. 1837) which in turn relied upon a misinterpretation of *Rex v. Goodall*, *supra* note 140, a case which ignored *Rex v. Young*, (Kings Bench, 189). See Hall, *THEFT, LAW & SOCIETY* (2nd ed. 1952) 49-52; Pearce, *Theft by False Promise*, *supra* note 138.

¹⁴² *Chaplin v. United States*, 157 F. 2d 697 (D.C. Cir. 1946).

¹⁴³ 224 Ill. 535, 79 N.E. 934 (1906); Platz, *The Criminal Code*, 1956 WIS. L. REV. 350, 375. The draftsmen were also cognizant of the thorough discussion by Pearce, *Theft by False Promise*, *supra* note 138.

¹⁴⁴ *Chilson v. People*, 224 Ill. at 535, 79 N.E. 934 (1906).

¹⁴⁵ NEB. REV. STAT. c. 28, Sec. 28-1207; LA. CODE CRIM. LAW & PROC. ANN. Art.

The construction of the federal mail fraud statute is of particular interest because of its similarity to the Criminal Code. As originally enacted the statute made criminal the use of the mails for ". . . any scheme or artifice to defraud."¹⁴⁶ In *Durland v. United States*¹⁴⁷ a conviction for mail fraud by representations in the form of promises was sustained. The defendant used the mail to sell bonds which he promised

740-67; federal mail fraud statute, 18 U.S.C. 1341, codifying 35 STAT. 1130 (1909), and the *Durland* decision, *supra* note 138. The Model Penal Code proscribes "Theft by Deception."

"... A promise which creates the impression that the promisor intends that the promise shall be performed is deceptive if he does not have that intention at the time of the promise; but the non-existence of that intention shall not be inferred from the fact alone that the promise was not performed." (206.2, Draft #4).

The comment to this section states:

"Of the various devices for swindling to which the criminal law has accorded some measure of immunity in the past, that which has the strongest support in precedent is the promise made without intention to perform. It has long been recognized in tort law that a promise ordinarily implies that the actor intends to perform, and that 'The state of a man's mind is as much a fact as the state of his digestion.' Nevertheless a majority of the American states adhere to a rule of non-liability in false pretense prosecutions. The reason usually given, aside from precedent, is that defaulting debtors would be subject to abusive prosecutions designed to force them to pay. Associated with this is the fear that conviction might be authorized upon no more evidence than the fact that the contract was not performed i.e., the fact of breach would be treated as sufficient evidence of an original intention not to perform. This danger is expressly averted by [the Model Penal Code, 206.2 *supra*].

"Prosecution based on false promises has been authorized under the federal mail fraud statute, for more than half a century, and is also possible under the laws of Rhode Island, California, Nebraska, Louisiana, Ohio, Massachusetts and New Jersey. Accordingly the drafting staff undertook to learn whether the feared abuses had been encountered in these jurisdictions. Inquiries were addressed to prosecuting attorneys, Better Business Bureaus, Post Office inspectors and the like. Answers were uniformly negative; paradoxically, the only serious complaint of abusive prosecutions against debtors for fraud came from New York, which follows the majority rule. It may also be noted that practically every jurisdiction has some special legislation punishing fraudulent promises which victimize certain special interest groups. For example, it is almost universally provided that to take lodgings without intent to pay is criminal [*cf.* 943.21] . . .

"A fear which has sometimes been expressed that businessmen may be unjustly subjected to criminal liability where they make contracts, intending, in the alternative to perform or to pay liquidated damages or such damages as the law allows the promisee, is without foundation. Not every promise implies an unequivocal intention to perform. A provision for liquidated damages would obviously be relevant evidence to show that the actor has not purposely created the false impression that he would in all events perform. In that event, the promisor could be held guilty only if he did not intend to do either. In short, here as elsewhere, the actor is to be understood in the sense which he expected and desired his hearer to understand him, and it is only where he did not believe what he purposely caused his victim to believe that he can be convicted of theft." (Comment 7 to 206.2, Tentative Draft #2, Model Penal Code.)

¹⁴⁶ The statute has since been amended to define explicitly the result of the *Durland* Case, see 18 U.S.C. 1341.

¹⁴⁷ 161 U.S. 306 (1896).

to redeem at higher prices although actually he had no intention to so do. The Supreme Court of the United States concluded that the statute included representations made in the form of a promise:

[The statute] includes everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future. The significant fact is the intent and purpose . . . The charge is that, in putting forth this scheme, it was not the intent of the defendant to make an honest effort for its success, but that he resorted to this form and pretense of a bond without a thought that he . . . would ever make good its promise. It was with the purpose of protecting the public against all such intentional efforts to despoil . . . that this statute was passed. . . .¹⁴⁸

A number of cases bear testimony to the court's efforts to avoid conflict with the limitation imposed by the "naked promise-present fact" distinction by finding misrepresentation of fact sometimes trivial *Frank v. State ex rel Meiers*,¹⁴⁹ is a leading example in Wisconsin. Here the defendant asked the complainant for a loan stating, "I got a couple of houses . . . I can give you a first mortgage on." The houses in fact were already mortgaged. At a preliminary examination the following exchange between the complainant and the defendant's lawyer took place:

Q. "You had *relied entirely on the promise* of this man to do something four days later, is that right" [Italics added.]

A. "Sure."

The circuit court discharged the defendant on a writ of habeas corpus following this preliminary examination, but the Supreme Court of Wisconsin reversed on the ground that the defendant had implied that the houses were *at the time* unencumbered.¹⁵⁰ On another occasion the Court construed a statement in the future tense, "I will give you," in the light of existing circumstances as actually meaning "I am giving you." Thus the Court found a representation of the existing fact.¹⁵¹ The Criminal Code should make such dubious constructions unnecessary.

At common law the false representation had to be one of fact and this requirement is recited in *Corscot v. State*.¹⁵² Cases in other jurisdictions state as a consequence that a misrepresentation of law can not be the basis for prosecution,¹⁵³ but the rationale of the law-fact distinc-

¹⁴⁸ *Id.* at 313. See also *United States v. Rowe*, 56 F. 2d 747 (2nd Cir. 1932).

¹⁴⁹ *Supra* note 138.

¹⁵⁰ 244 Wis. at 660, 12 N.W. 2d at 924 (1944).

¹⁵¹ *Corscot v. State*, *supra* note 129 at 669. In *State ex rel Labuwi v. Hathaway*, *supra* note 7, the defendant advertised a Fourth of July celebration "for the benefit of the American Red Cross." It was not in fact such a benefit and the defendant pocketed the proceeds. The Court held that false pretenses would lie because there was implied the representations that the celebration was for the benefit of the Red Cross, that he acted for the Red Cross, and was in the business of raising funds for the Red Cross.

¹⁵² 178 Wis. at 671.

¹⁵³ *State v. Jamison*, 268 Mo. 185, 186 S.W. 972 (1916). *State v. Edwards*, 178 Minn. 446, 227 N.W. 495 (1929) where the defendant represented that certain

tion here is again questionable. Where liability has been denied it had been on the ground that everyone is presumed to know the law, and that "ordinary vigilance" will disclose the truth or falsehood of representations as to matters of law.¹⁵⁴ However, as negligence of the victim as to other kinds of misrepresentations is not a defense,¹⁵⁵ it is hard to see why it should be here. The Model Penal Code rejects the distinction stating that "deception may relate to value, law, opinion, intention, or other state of mind."¹⁵⁶

Whether or not the kind of representations made by salesmen in efforts to sell their wares be false representation is a much debated issue. Exaggeration by sellers is commonplace and generally harmless since buyers are usually aware that products are not all they are claimed to be. Nevertheless circumstances may dictate criminal liability on the basis of false statements of value by sellers. In *Bates v. State*,¹⁵⁷ the defendant represented that he had paid a certain price for land when in fact he had paid less. This, said the Court, was not a matter of opinion, although its effect was to convince the hearer of the value of the property.¹⁵⁸

If a relation of trust and confidence exists and if there is an expectation of reliance upon statements calculated to induce the hearer to make a bargain different from the one he thought he was making, a court is likely to find liability despite the opinion-characteristics of the statement.¹⁵⁹ In *United States v. Rowe*,¹⁶⁰ Judge Learned Hand stated:

... the law still recognizes that in bargaining parties will puff their wares in terms which neither side means seriously, and which either so takes at his peril . . . ; but it is no longer law that declarations of value can never be a fraud. Like other words, they get their color from their setting, and mean one thing when exchanged between traders, and another when uttered by a broker to his customer. Values are facts as much as anything else; they forecast the present opinions of possible buyers and sellers, and concern existing, though inaccessible facts. Such latitude as the law accords utterances about them, depends upon the hearer's knowledge that the utterer expects him to use his own wits; and while may once have been true that one might safely use them

stock was "non assessable." The majority held that this was a representation of the law of Minnesota, and could not be the basis for the crime of false pretenses. The Court suggested, however, that false pretenses might lie if the representation concerned the law of a foreign jurisdiction, or a relation of trust and confidence existed between the defendant and the victim.

¹⁵⁴ *State v. Edwards*, *supra* note 153.

¹⁵⁵ *Palotta v. State*, 184 Wis. 290, 199 N.W. 72 (1924); *State ex rel Hull v. Larson*, *supra* note 131; Clark and Marshall pp. 830-831.

¹⁵⁶ 206.2(2) Tentative Draft #4.

¹⁵⁷ 124 Wis. 612, 103 N.W. 251 (1905).

¹⁵⁸ *Id.* at 619.

¹⁵⁹ Melli and Remington, *Theft a Comparative Analysis*, 1954 WIS. L. REV. 253, 264.

¹⁶⁰ 56 F. 2d 747 (2nd Cir. 1932).

to stuff any gull one brought to hand, liability has expanded as the law has become more tender toward credulity.¹⁶¹

4. *The mental element in 943.20(1)d.*

The defendant must intend to deprive the owner of title. It follows, therefore, that an intention to return the property after temporary use, will be a defense to a prosecution under this section.

The statute further requires that the defendant "intentionally" deceive the victim,¹⁶² by a representation "known" to be false, with an "intent to defraud." The latter requisite was demanded by the common law and its application normally gives no difficulty. An intent to defraud has not been found where the defendant by a trick induced the victim to part with something to which the defendant had a legitimate claim.¹⁶³

An intention to defraud need not be proved by direct and positive evidence, it may be inferred from all the circumstances proved.¹⁶⁴ In *State ex rel Hull v. Larson*,¹⁶⁵ the defendant, a truck owner charged with obtaining money from Dane County, was shown to have intentionally stated an excessive number of hours on the time sheets recording the number of hours his truck was used by the county, and to have accepted and retained the excessive amounts paid. From this the Court stated an intention to defraud Dane County could be inferred.¹⁶⁶

G. *Theft-Value*

At common law the property involved in a wrongful appropriation had to have some real value.¹⁶⁷ The question of value should be submitted to the jury.¹⁶⁸ The Code provides:

(c) "Value" means the market value at the time of the theft or the cost to the victim of replacing the property within a reasonable time after the theft, whichever is less, but if the property stolen is a document evidencing a chose in action or other in-

¹⁶¹ *Id.* at 747. The Model Penal Code's treatment of "Puffing" is helpful.

"Exaggerated commendation of wares in communications addressed to the public or to a class or group shall not be deemed deceptive if:

(a) it would be unlikely to mislead the ordinary persons of the class or group addressed; and

(b) there is no deception other than as the actor's belief in the commendation; and

(c) the actor was not in a position of special trust and confidence in relation to the misled party."

(206.2(3) Tentative Draft #4).

¹⁶² See WIS. STAT. §939.23(3) (1959).

¹⁶³ *In re Cameron*, 44 Kan. 64, 66 (1890); *People v. Thomas*, 3 Hill 169 (N.Y. 1842); Clark & Marshall, *LAW OF CRIMES* (6th ed. 1958) 823; Perkins, *CRIMINAL LAW*, 864.

¹⁶⁴ *State v. Hintz*, *supra* note 135; *State ex rel Hull v. Larson*, *supra* note 131. See also *Knickerbocker Merchandising Co. v. United States*, 13 F. 2d 544 (2nd Cir. 1926).

¹⁶⁵ *State ex rel Hull v. Larson*, *supra* note 131.

¹⁶⁶ 226 Wis. at 594; *State v. Hintz*, *supra* note 135.

¹⁶⁷ Perkins, *CRIMINAL LAW*, 194; Clark & Marshall, *LAW OF CRIMES*, 716.

¹⁶⁸ *State v. Clementi*, *supra* note 24; *Koch v. State*, 126 Wis. 470, 478, 106 N.W. 531 (1906).

tangible right, value means either the market value of the chose in action or other right or the intrinsic value of the document, whichever is greater. If the thief gave consideration for, or had a legal interest in, the stolen property, the amount of such consideration or value of such interest shall be deducted from the total value of the property.¹⁶⁹

The legality of the victim's possession has no bearing on the matter of value. In *Clementi v. State*,¹⁷⁰ the defendant stole certain gambling devices. In holding that the nature of the property stolen does not militate against a conviction, the Court stated:

We see no inconsistency in holding that contraband property may be the subject of larceny, and in a holding that a court will not lend its aid to a party to recover the value of contraband articles in a civil action. Certainly one who has unlawfully procured possession of an article belonging to another ought not to be permitted to defend himself on the ground that that which he had stolen has no value because its use is forbidden. If it had no value, why did he steal it? It is a well-known fact that many contraband articles have been sold and that a market of a sort exists therefor. . . . The state is not seeking to recover the property or its value. It is seeking to punish the defendants for violation of its criminal laws.¹⁷¹

The contraband nature of the material is, of course, relevant because it "affects its usability and therefore its salability."¹⁷² If the property is salable the Court states its marketability may be established "in the usual way."¹⁷³ Candor requires that one recognize the difficulty in establishing the market value of contraband goods, and the use of expert witnesses, if available, might result in some unusual testimony.

The Code's definition of "value" does not treat specially the problem created by the person who misappropriates property believing it to be of greater, or less, value than it is in fact, or the person who maliciously misappropriates property which has an insignificant market value but is highly prized by the owner.¹⁷⁴

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¹⁶⁹ WIS. STAT. §943.20(2)c (1959). The Proposed Code simply stated that "value" means market value at the time of stealing, except that in the case of property without market value, value means cost of replacement."

¹⁷⁰ *Supra* note 24.

¹⁷¹ 224 Wis. at 152.

¹⁷² *Id.* at 153.

¹⁷³ *Ibid.*

¹⁷⁴ The Model Penal Code, Section 205.15, Tentative Draft #4, states that: "the amount involved [in theft] shall be the highest value of the stolen property by any standard which is reasonably applicable. . . ." (Emphasis supplied.). Where the evidence of value is insufficient the theft will be deemed a misdemeanor.

The comment to this section makes several valid points:

"... the amount involved has criminologic significance only if it corresponds with what the thief expected to get. A man who steals what he believes to be a diamond necklace from the counter of Tiffany's is

not a 'petty thief' psychologically when it turns out that they are rhinestones. He has consciously risked a determined pursuit by private and public investigating agencies, the difficulties of disposing of the loot, and the prospect of a long sentence if he is caught. The tramp who lifts a shabby overcoat off a restaurant wall-hook evinces no such defiant disregard of valuable property rights, even if it turns out that \$100 bills have been sewn in the lining.

"On the other hand there are administrative reasons for giving at least *prima facie* effect to the amount actually stolen: (a) The prosecutor needs a readily ascertainable fact by which he can choose between proceeding in a felony court or, for a petty misdemeanor, in a court of limited jurisdiction. It would be distinctly inconvenient to learn at trial for the felony that the defendant was prepared to prove his belief that the object stolen was worth only \$10, thus, perhaps, depriving the court of jurisdiction. . . ."